



27 January 2021

The Hon. Adam Searle MLC
Chair
Select Committee on the High Level
of First Nations People in Custody and
Oversight and Review of Deaths in Custody
Parliament of New South Wales
Macquarie Street
SYDNEY NSW 2000

Response to Questions on Notice from the Select Committee Inquiry into the High Level of First Nations People in Custody and Oversight and Review of Deaths in Custody

Dear the Hon. Mr Adam Searle

I refer to my appearance to give evidence before the Select Committee (**Select Committee**) undertaking the Inquiry into the High Level of First Nations People in Custody and Oversight and Review of Deaths in Custody (**Inquiry**) on 8 December 2020. During my evidence, I took a number of questions on notice.

On 15 December 2020, Ms Taylah Cauchi, Administration Officer, sent me an email requesting that I provide the answers to the questions that I took on notice and any corrections to the Transcript of the Inquiry hearing on 8 December 2020 to the Select Committee by **5pm on 22 January 2021**. On 22 January 2021 I was granted an extension of time to provide my responses by **27 January 2021**.

My responses to the questions taken on notice and corrections to the Transcript are **attached** to this letter.

I note that I have not been asked to provide a response to any supplementary questions.

Should you or the Select Committee require any further clarification, please do not hesitate to contact me.

Yours faithfully

Fiona Rafter
Inspector Custodial Services

Attachments:

1. Responses to questions taken on notice by Ms Fiona Rafter, Inspector of Custodial Services, before the Select Committee undertaking the Inquiry on 8 December 2020, dated 22 January 2021.
2. Soft copy of Venn diagram outlining interaction between responsible authorities for Correctional Facilities.
3. Clarifications to the Transcript of the Inquiry Hearing on 8 December 2020.

Response to questions taken on notice by Fiona Rafter, Inspector of Custodial Services, before the Select Committee on the High Level of First Nations People in Custody and Oversight and Review of Deaths in Custody on 8 December 2020 (Inquiry Hearing)

Question 1 (see page 45 of the Transcript of Committee Hearing):

"The Hon. PENNY SHARPE: Do we have a situation in New South Wales - I mean, if the Commonwealth Ombudsman is doing it, I would assume that it would first look to State ombudsmen to be the most likely. Is it the case that, where there are offices such as yours - so Queensland, Western Australia - it could either be split or you could decide either way?"

Ms RAFTER: Western Australia has already announced their Inspector of Custodial Services as an NPM.

The Hon. PENNY SHARPE: Yes, but is it them plus their Ombudsman?

Ms RAFTER: I am not sure. It may be so, but I would have to take that on notice and let you know.

The Hon. PENNY SHARPE: If you could take that on notice that would be great."

Response:

The Australian Capital Territory, Northern Territory, South Australia, Victoria, Queensland, Tasmania and New South Wales have not yet nominated National Preventative Mechanisms (NPMs). Western Australia is the only State or Territory (apart from the Commonwealth) to have formally nominated its NPMs,¹ having done so on 17 July 2019.² Two bodies have been appointed as NPMs in Western Australia, namely, the Western Australian Ombudsman (WA Ombudsman) and the Western Australian Office of the Inspector of Custodial Services (WA ICS).³ However there is a distinction between the NPM roles that these two bodies will perform.

On 17 July 2019, the Western Australian Government stated that the WA ICS will be the NPM for "justice-related facilities including police holding cells" and the WA Ombudsman will be the NPM for "Western Australia's mental health and other secure facilities" (i.e. for those places of detention not under the jurisdiction of the WA ICS - for example, people detained under mental health or disability legislation).⁴ The WA ICS has jurisdiction over places of detention (correctional facilities, juvenile detention centres, court custody centres and certain prescribed police lock-ups). Following the implementation of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT), the jurisdiction of the WA ICS will be extended to include approximately 27 additional police lock-ups which satisfy the definition of "primary places of detention". The jurisdiction of the WA Ombudsman will be limited to some residual areas covered by the OPCAT, including mental health facilities and other secure facilities.

¹ Australian Human Rights Commission, *Implementing OPCAT in Australia* (Report, 2020) 23.

² Commonwealth Ombudsman, *Implementation of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT): Baseline Assessment of Australia's OPCAT Readiness* (Report No. 3, 2019) 30, [2.95].

³ Commonwealth Ombudsman, *Implementation of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT): Baseline Assessment of Australia's OPCAT Readiness* (Report No. 3, 2019) 30, [2.95].

⁴ Commonwealth Ombudsman, *Implementation of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT): Baseline Assessment of Australia's OPCAT Readiness* (Report No. 3, 2019) 30, [2.95].

Question 2 (see page 50 of the Transcript of Committee Hearing):

"Ms RAFTER: Yes, and we have the power to do unannounced now - and we do, at times.

Mr DAVID SHOEBRIDGE: When? How often this you [sic] have you done unannounced visits?

Ms RAFTER: This year there has been COVID, so that has created - everybody needs to be recorded and everything.

Mr DAVID SHOEBRIDGE: I get that, Ms Rafter. Perhaps if you could give us a sense over time? The fairest thing would be a sense over time.

Ms RAFTER: This year I think it has been about three or four unannounced visits that we have done.

Mr DAVID SHOEBRIDGE: Would that be consistent over time?

Ms RAFTER: We have probably been increasing it over time.

Mr DAVID SHOEBRIDGE: Last year?

Ms RAFTER: Last year it was probably - it might have been three unannounced.

The CHAIR: Perhaps we could get a list from you for each year that you have held the office of Inspector of Custodial Services?

Ms RAFTER: Originally we were not doing unannounced, but we have incorporated that now."

Response:

Section 7(b) of the *Inspector of Custodial Services Act 2012* (NSW) (**ICS Act**) empowers me to undertake unannounced inspections of custodial centres. The ICS Act confers broad-ranging powers on me in the exercise of my functions, including the power to: visit and examine any custodial centre at any time I see fit; obtain records of custodial centres; be given access to persons in custody; and, refer matters relating to custodial centres on to appropriate agencies for consideration.

My examinations of custodial centres broadly fall into two categories: inspections and visits. Announced inspections are significant undertakings that require my Office to obtain and analyse data and information from custodial centres in advance and prior to myself and my team attending the centre for any physical inspection. It also involves scheduling interviews with management, custodial staff, non-custodial staff, health staff and inmates as well as observing daily operations and operational meetings. Accordingly, my inspections too date have been announced and I always provide a substantial period of notice. This is necessary to ensure the inspection process is productive, efficient and effective. I retain discretion to conduct unannounced inspections.

In contrast, visits can be announced, unannounced or conducted on short notice depending on the purpose of the visit. The amount of notice provided to a custodial centre is entirely dependent upon the reason for the visit. Planning or follow up visits related to inspections usually require some notice period to ensure the availability of relevant persons (inmates and personnel) during the visit to the centre. Visits to monitor the progress of implementation of ICS recommendations ideally occur on a regular basis and may be conducted at short notice or without notice if there are ongoing concerns. During 2020, there were two unannounced visits. In 2019, there were was one unannounced visit and, in 2018, there was one unannounced visit. There were no unannounced visits during 2016 and 2017.

COVID-19 monitoring visits took place regularly during 2020. The ICS may also visit following incidents. For example, in the aftermath of the riot at Frank Baxter Youth Justice Centre in 2019, my staff and I visited the centre on multiple occasions (5) between August and November 2019 to monitor conditions and the treatment of young people in the centre and brought forward a planned inspection of the centre to 19-23 August 2019.

Question 3 (see page 52 of the Transcript of Committee Hearing):

"Mr DAVID SHOEBRIDGE: Ms Rafter, if you wanted additional funding now, which Minister would you send your request to?

Ms RAFTER: For additional funding now, it would be the corrections Minister.

Mr DAVID SHOEBRIDGE: Again, Ms Rafter, you would agree with me, would you not, that that is contrary to the necessary independence, especially for OPCAT?

Ms RAFTER: I believe that is a similar arrangement to the other inspectors, but if I could take it on notice I could give you a fulsome answer as to whether that is really any different from how it operates in other jurisdictions.

Mr DAVID SHOEBRIDGE: Could I suggest that if there is that kind of issue in WA or the ACT it does not remove the issue for New South Wales? In addition to whether or not that is consistent with other jurisdictions, could you address whether or not you believe it meets the necessary independence required by OPCAT?

Ms RAFTER: Yes, I will undertake to do that."

Response:

I understand that Mr David Shoebridge's reference to *"the necessary independence"* is a reference to Article 18(1) of OPCAT, which reads: *"The States Parties shall guarantee the functional independence of the national preventive mechanisms as well as the independence of their personnel."*

I believe that my Office possesses the functional independence required by Article 18(1) of OPCAT. The Australian Human Rights Commission states that *"functional, structural and personal"* independence is required to implement Article 18(1) of OPCAT.⁵

The role of the Commonwealth Ombudsman

Under the *Ombudsman Regulations 2017* (Cth),⁶ the function of the National Preventive Mechanism Coordinator (**NPM Coordinator**) is conferred on the Commonwealth Ombudsman for the purposes of giving effect to Australia's obligations under OPCAT. The NPM Coordinator's functions include, relevantly:

- (a) consulting with governments and other bodies on the development of standards and principles regarding the treatment and conditions of persons deprived of their liberty;⁷
- (b) proposing options and developing resources to facilitate improvements in oversight arrangements in relation to persons deprived of their liberty;⁸ and
- (c) functions incidental to the function of NPM Coordinator.⁹

The Commonwealth Ombudsman contemplates that, as the NPM Coordinator, it will have *"a policy and research role to promote improvements and share experiences between bodies in strengthening oversight in places of detention. This is likely to also include developing ways to respond to issues that*

⁵ See Australian Human Rights Commission, *Implementing OPCAT in Australia* (Report, 2020) 38, [7.2].

⁶ See Part 4, Division 2.

⁷ *Ombudsman Regulations 2017* (Cth), r 17(3)(a).

⁸ *Ombudsman Regulations 2017* (Cth), r 17(3)(c).

⁹ *Ombudsman Regulations 2017* (Cth), r 17(3)(i).

are common across places of detention and jurisdictions".¹⁰ Importantly, however, the NPM Coordinator must not compel or direct a person or body that is part of the National Preventive Mechanism Network (**NPM Network**).¹¹

The Commonwealth Ombudsman has identified the WA ICS as the most advanced in terms of OPCAT compliant inspections. The Commonwealth Ombudsman has also recognised that the independence of the WA ICS (and the WA Ombudsman) is protected through reporting to Parliament, rather than to a Minister and that they are not accountable to the Executive arm of government.¹² As discussed later in this section, the NSW ICS also reports to Parliament and has similar independence.

Additionally, the Commonwealth Ombudsman has identified both the ACT ICS and the Office of the Custodial Inspector Tasmania (who is also the Ombudsman in Tasmania) as meeting the OPCAT requirements for functional independence.¹³ The NSW ICS has been identified by the Commonwealth Ombudsman as "meeting the requirements for independence and public reporting".¹⁴

The United Nations Human Rights Office of the High Commissioner's (**UN OHCHR's**) *Preventing Torture: The Role of National Preventive Mechanisms - a Practical Guide* is informative as to the nature of the independence required of NPMs by Article 18(1) of OPCAT.¹⁵ According to the UN OHCHR, functional independence requires a legislative mandate as well as operational and financial independence.¹⁶ Each of these are addressed below in relation to the NSW ICS.

1. The legislative mandate

The OPCAT requires the following powers for the legislative mandate criterion to be satisfied.¹⁷ Each of the following are satisfied under the ICS Act.

- (a) freely select the custodial centres to be visited;¹⁸
- (b) regularly examine the treatment of people in custodial centres;¹⁹
- (c) select the timing of visits and whether they are announced or unannounced;²⁰
- (d) choose who is to be interviewed;²¹
- (e) access all information necessary for pursuing its mandate;²²

¹⁰ Commonwealth Ombudsman, *Implementation of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT): Baseline Assessment of Australia's OPCAT Readiness* (Report No. 3, 2019) 7, [1.10].

¹¹ *Ombudsman Regulations 2017* (Cth), r 17(4).

¹² Commonwealth Ombudsman, *Implementation of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT): Baseline Assessment of Australia's OPCAT Readiness* (Report No. 3, 2019) 29, n 83.

¹³ Commonwealth Ombudsman, *Implementation of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT): Baseline Assessment of Australia's OPCAT Readiness* (Report No. 3, 2019) 21, [2.39]; 27, [2.75].

¹⁴ Commonwealth Ombudsman, *Implementation of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT): Baseline Assessment of Australia's OPCAT Readiness* (Report No. 3, 2019) 22, [2.46].

¹⁵ United Nations Office of the High Commission for Human Rights, *Preventing Torture: The Role of National Preventive Mechanisms - A Practical Guide* (Professional Training Series No. 21, 2018) 15-17.

¹⁶ United Nations Office of the High Commission for Human Rights, *Preventing Torture: The Role of National Preventive Mechanisms - A Practical Guide* (Professional Training Series No. 21, 2018) 15.

¹⁷ United Nations Office of the High Commission for Human Rights, *Preventing Torture: The Role of National Preventive Mechanisms - A Practical Guide* (Professional Training Series No. 21, 2018) 15

¹⁸ *Inspector of Custodial Services Act 2012* (NSW), s 7(b).

¹⁹ *Inspector of Custodial Services Act 2012* (NSW), s 7(b).

²⁰ *Inspector of Custodial Services Act 2012* (NSW), s 7(b).

²¹ *Inspector of Custodial Services Act 2012* (NSW), s 7(d), (e).

²² *Inspector of Custodial Services Act 2012* (NSW), s 7(a), (c).

- (f) make recommendations to the relevant authorities;²³
- (g) submit proposals and observations concerning existing or draft legislation,²⁴ and
- (h) contact the United Nations Subcommittee on Prevention of Torture.²⁵

2. Operational independence

The NSW ICS has operational independence as it is not under the institutional control of the Executive branch of government ("*...such as a ministry, cabinet or executive council, president or prime minister*").²⁶ Inspectors are appointed by the Governor of NSW and report directly to Parliament.²⁷ The NSW ICS operates independently of Corrective Services NSW (**CSNSW**), Youth Justice NSW (**YJNSW**) and Justice Health and Forensic Mental Health Network (**JHFMHN**). However, the NSW ICS may enter relationships with these agencies.²⁸ I am required to provide the Minister with a draft of each report to Parliament and give the Minister a reasonable opportunity to make submissions in relation to the draft report.²⁹ Also, I must not make a report to Parliament that sets out an opinion that is critical of a Public Service agency (other than CSNSW or YJNSW) or any person unless I have afforded them the opportunity to make submissions.³⁰ Importantly, however, I am not required to amend a draft report in light of any submissions made by the Minister, an agency head or other person.³¹ The independence of my Office is further reinforced by section 19 of the ICS Act which makes it an offence to obstruct, hinder, resist or threaten an Inspector or their staff in the exercise of functions under the ICS Act.

3. Financial independence

My Office also has financial independence. I am entitled to determine my own spending priorities within my overall allocated budget. Our funding arrangements are similar to those followed by the WA ICS in that additional funding must also be sought from the relevant Minister. The financial independence of the NSW ICS is further fortified by the fact I receive funding directly from the Justice Cluster. This is the same arrangement as is in place for other statutory-appointed officers such as the Office of Solicitor General and Public Defenders Office. The NSW ICS is required to report directly to Parliament³² (including providing an Annual Report to the NSW Parliament which outlines the relevant accounts and expenditure within my Office) and is subject to the oversight jurisdiction of both the Parliamentary Joint Committee³³ and Independent Commission Against Corruption (**ICAC**).³⁴

The fact that funding is sourced from government does not compromise an NPM's financial independence.³⁵ To the contrary, parties have a legal obligation under Article 18(3) of OPCAT to "*make available the necessary resources for the functioning of the national preventive mechanisms*". The fact that an NPM is government funded does not undermine the independence of an NPM.

²³ *Inspector of Custodial Services Act 2012* (NSW), ss 9-11, div 4.

²⁴ *Inspector of Custodial Services Act 2012* (NSW), s 8.

²⁵ *Inspector of Custodial Services Act 2012* (NSW), s 8.

²⁶ United Nations Office of the High Commission for Human Rights, *Preventing Torture: The Role of National Preventive Mechanisms - A Practical Guide* (Professional Training Series No. 21, 2018) 15-16.

²⁷ *Inspector of Custodial Services Act 2012* (NSW), s 4(1) and Div 4.

²⁸ *Inspector of Custodial Services Act 2012* (NSW), s 9.

²⁹ *Inspector of Custodial Services Act 2012* (NSW), s 14(1).

³⁰ *Inspector of Custodial Services Act 2012* (NSW), s 14(2).

³¹ *Inspector of Custodial Services Act 2012* (NSW), s 14(3).

³² *Inspector of Custodial Services Act 2012* (NSW), Division 4.

³³ *Inspector of Custodial Services Act 2012* (NSW), Part 3; *Ombudsman Act 1974* (NSW) Part 4A.

³⁴ *Independent Commission Against Corruption Act 1988* (NSW) ss 3, 8.

³⁵ United Nations Office of the High Commission for Human Rights, *Preventing Torture: The Role of National Preventive Mechanisms - A Practical Guide* (Professional Training Series No. 21, 2018) 16.



OPCAT also requires parties to give due consideration to the Paris Principles³⁶ which frame and guide the work of National Human Rights Institutions (**NHRI**) when establishing NPMs.³⁷ The Paris Principles recognise the necessity of adequate government funding and identify the purpose of such funding as being to "enable [a NHRI] to have its own staff and premises, in order to be independent of the Government and not be subject to financial control which might affect its independence".³⁸ The NSW ICS, as a separate statutory office, satisfies these Principles.

³⁶ United Nations Office of the High Commission for Human Rights, *Preventing Torture: The Role of National Preventive Mechanisms - A Practical Guide* (Professional Training Series No. 21, 2018) 15.

³⁷ United Nations Office of the High Commission for Human Rights, *Preventing Torture: The Role of National Preventive Mechanisms - A Practical Guide* (Professional Training Series No. 21, 2018) 15.

³⁸ *Principles relating to the Status of National Institutions (The Paris Principles)* GA Res 48/134 (20 December 1993).

Requests for additional funding

The Select Committee has specifically asked about requests for additional funding with reference to the WA ICS. The Inspectors of Custodial Services in Western Australia, the Australian Capital Territory and Tasmania respectively are all funded under a similar State Government funding model. Each funding model is outlined in the annual reports of each statutory office.³⁹ Requests for additional funding for the NSW ICS can be made by a submission to the Minister for Counter Terrorism and Corrections or to NSW Treasury through the Justice Cluster. Similarly, the WA ICS makes submissions for additional funding through the office of the Minister responsible for Corrective Services in Western Australia (which are, in turn, considered by Cabinet during the budget process).⁴⁰ The WA ICS funding model has not prevented it from being appointed by the Western Australian Government as the NPM body responsible for "justice-related facilities including police holding cells".⁴¹

It should be noted that the independence of funding for the WA ICS is further bolstered by a direct appropriation from Treasury rather than the Department of Justice (which is the case for the NSW ICS). However, as identified above, the slightly different approach to the NSW ICS funding has not precluded it from being recognised by the Commonwealth Ombudsman (who is the NPM Coordinator) as being independent for OPCAT compliance purposes.

4. Additional considerations in relation to independence

My position as Inspector is a statutory office which is entirely governed by the ICS Act. It should be noted that the *Government Sector Employment Act 2013* (NSW) (**GSE Act**) does not govern the role of Inspector.⁴² However, the staff of the NSW ICS are Public Service employees who are subject to the provisions of the GSE Act.⁴³ The head of the Public Service Agency in which NSW ICS staff are employed (Department of Communities and Justice) may delegate to the Inspector any of their functions under the GSE Act with respect to those staff.⁴⁴ I have received such a delegation and this empowers me to manage the employment of non-executive level employees within the NSW ICS including making determinations with respect to:

- (a) formal qualifications;
- (b) security and other clearances;
- (c) temporary assignment of employees to other roles;
- (d) creation of temporary (contractor) positions;
- (e) secondments between public service agencies; and
- (f) routine employment decisions around leave, work hours, and employment-related compensation arrangements.⁴⁵

³⁹ Western Australian Office of the Inspector of Custodial Services, *Annual Report 2019-20* (Report, 3 November 2020) 48; ACT Inspector of Correctional Services, *2019-20 Annual Report* (Report, 18 December 2020) 20; Office of the Custodial Inspector Tasmania, *Custodial Inspector Annual Report 2019-2020* (Report, October 2020) 7-8.

⁴⁰ In Western Australia, the Office of the Inspector of Custodial Services receives funding by way of direct appropriation from Treasury out of the Consolidated Account: *Appropriation (Recurrent 2019-20) Bill 2019* sch 1, item 67.

⁴¹ Commonwealth Ombudsman, *Implementation of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT): Baseline Assessment of Australia's OPCAT Readiness* (Report No. 3, 2019) 30, [2.95].

⁴² *Inspector of Custodial Services Act 2012* (NSW), Sch 1 cl 8(1).

⁴³ *Government Sector Employment Act 2013* (NSW), Part 4, Divisions 5, 7.

⁴⁴ *Inspector of Custodial Services Act 2012* (NSW), s 5(4).

⁴⁵ NSW Department of Justice Delegations Manual, Human Resources, HR001 pages 9-13. However, the authority to make organisational engagement decisions (such as creation of additional permanent roles) remains with the Departmental Secretary.



I have the power to enforce the provisions of the GSE Act,⁴⁶ including in relation to: determining the kinds of roles the Office requires;⁴⁷ termination of employment;⁴⁸ conditions of engagement;⁴⁹ leave;⁵⁰ and resignation.⁵¹

Additionally, I may engage persons as "*consultants*" to perform services for my Office.⁵²

⁴⁶ To the extent permitted by my delegation from the Department of Communities and Justice.

⁴⁷ *Government Sector Employment Act 2013* (NSW), s 43.

⁴⁸ *Government Sector Employment Act 2013* (NSW), s 47.

⁴⁹ *Government Sector Employment Act 2013* (NSW), s 54.

⁵⁰ *Government Sector Employment Act 2013* (NSW), s 54A.

⁵¹ *Government Sector Employment Act 2013* (NSW), s 55.

⁵² *Inspector of Custodial Services Act 2012* (NSW), s 5(2).

Question 4 (see page 53 of the Transcript of Committee Hearing):

"The Hon. PENNY SHARPE: *Can you provide the Committee - again, you can do so on notice. You do not need to know the numbers off the top of your head - the number of referrals you have made to those bodies over the time you have been there?*

Ms RAFTER: *Yes. Look, it is probably better that I do take it on notice just because of the nature of them.*

The Hon. PENNY SHARPE: *Yes, of course.*

Ms RAFTER: *Yes, I have referred to LECC to ICAC and to the Ombudsman.*

The Hon. PENNY SHARPE: *Could you provide the number of times that you have done that from when you started in 2016? That would be great. We are trying to get to the point of this Corrections oversight. We think that there is a gap. Whether you have referred conduct matters to the ICAC, would you be able to indicate that to us?*

Ms RAFTER: *Yes."*

Response:

I am empowered to refer matters to the NSW Ombudsman and ICAC pursuant to sections 10 and 11 of the ICS Act respectively. Since my appointment as Inspector, I have made two referrals to the NSW Ombudsman and two referrals to ICAC. Additionally, I have made one referral to the Law Enforcement Conduct Commission (**LECC**) pursuant to the *Law Enforcement Conduct Commission Act 2016* (NSW). However, I am not at liberty to discuss the details of these referrals.

Question 5 (see page 55 of the Transcript of Committee Hearing):

The CHAIR: *In 2018 there was a bit of controversy in the media about you amending one of your reports in light of feedback from the Minister, but you were not forthcoming as to what those changes were. Are you able to tell us or provide us on notice some insight into what those changes were in relation to that report?*

Ms RAFTER: *Yes, I am more than happy to take it on notice. At that point of the process I am usually still doing some editorial. I am working on one at the moment that is due to be tabled very soon.*

The CHAIR: *I guess the question is whether they were simply grammatical, editorial changes or whether they were substantial -*

Ms RAFTER: *Updating data - I know I went into one. I have had the Minister's feedback but it was not anything raised by the Minister. I realised that the Bureau of Crime Statistics and Research report had probably just been updated so I just wanted to make sure what I had in there was the most accurate and up to date; it was not changing anything in particular.*

The CHAIR: *You did not change any of the recommendations?*

Ms RAFTER: *Any substantive.*

The CHAIR: *You did not change any recommendations?*

Ms RAFTER: *No.*

Mr DAVID SHOEBRIDGE: *Just to close the loop on this, each of your reports have gone through that process with the Minister, is that right?*

Ms RAFTER: *That is right.*

Mr DAVID SHOEBRIDGE: *Have you changed your recommendations at any point following a response from the Minister?*

Ms RAFTER: *I will take that on notice in case I have changed a word - but not necessarily because of what is in the Minister's submission.*

Mr DAVID SHOEBRIDGE: *There have been a bunch of reports so I am more than happy for you to take that question on notice and I think it is only right that you do.*

Ms RAFTER: *Yes, there have been a lot.*

The CHAIR: *It is not a "gotcha" moment; we just want to know the answer.*

Ms RAFTER: *Yes, I appreciate that. To make sure it is complete accurate I will take it on notice."*

Response:

The recommendations referred to by the Chair are those contained in the *Use of Force, Separation, Segregation and Confinement in NSW Juvenile Justice Centres* report, released in November 2018 (**2018 Report**).

In the process of finalising the 2018 Report, I provided the Minister with an opportunity to provide a submission under section 14(1). The Minister did not make a submission, however I received a response from the Secretary of Justice, who had consulted the Minister's office. I gave due consideration to the submission as required by the ICS Act. In finalising the 2018 Report, I made a number of editorial changes to the recommendations to: improve clarity; aid implementation; reflect where proposed

recommendations had already been addressed or implemented; and, consolidated recommendations to remove duplication.

I have also made editorial changes to recommendations in other reports following a response from a Minister. The nature of these changes include: editorial changes to improve clarity and aid implementation; consolidating recommendations to remove duplication; removing recommendations that have become redundant due to the effluxion of time (for example, if a proposed recommendation is no longer relevant due to a facility being repurposed); or, on occasion, removing reference to recommendations (or part thereof) that could reveal security or national security information.⁵³

Consistent with my evidence before the Budget Estimates Committee (Portfolio Committee No 4: Legal Affairs) on 19 December 2018, it is my usual practice to make final changes to my reports after I receive a response from a Minister.⁵⁴ This may include editorial changes, updating data and information, or including additional relevant information. Although I must give due consideration to any submission that I receive from a Minister before I finalise a report, I am not bound to amend a report in light of any submission from a Minister and I have not made substantive changes to my reports as a result of a submission from a Minister.

The other reason that I may make changes to the body of my reports before tabling in Parliament is that the draft reports may include more fulsome details to provide greater context about the subject matter of the report and to allow the Minister to fully consider the issues raised in the relevant draft report. This information is often sensitive, confidential and of a kind that is ordinarily protected by the ICS Act and other mechanisms such as by public interest immunity. Accordingly, for the reasons set out below, I am not at liberty to either disclose the contents of my draft reports or to detail any changes made to them that would reveal the sensitive and confidential information contained within them.

The nature of the confidential and sensitive information that may, for example, be removed from draft reports can fall into the following categories that would ordinarily be protected from disclosure:

1. Identifying information, and unique identifiers of staff, juvenile detainees and adult inmates and other persons, including those who have disclosed information on a confidential basis (whether directly to me in my capacity as Inspector and those assisting me, or to other agencies or individuals). Some of these people are effectively informants. In some cases, this protection will necessarily need to extend to the substance of the confidential information itself (for example, in the case where an informant may be one of a few persons or roles privy to that information and they may be easily identified on the face of the information itself);
2. Operationally sensitive information, including:
 - a. information regarding the security, discipline and good order of custodial centres including confidential methodologies for ensuring the safety of staff and inmates (generally and in particular cases) and for preventing and/or detecting breaches of security and/or the law; and/or
 - b. intelligence and information of ongoing operational and investigative value to CSNSW and other law enforcement agencies.

The disclosure of such information would prejudice the free flow of information from individuals and agencies on whom the NSW ICS relies to perform its functions and may prejudice the safety and security

⁵³ *Inspector of Custodial Services Act 2012* (NSW), s 15(3).

⁵⁴ At the time of giving my evidence, I was only required to consult with one Minister. However, since the State Election in March 2019, I have consulted with more than one Minister.

of individuals (including, but not limited to, detainees, inmates and staff). Disclosure could also compromise the current and future work of CSNSW, YJNSW and other law enforcement agencies.

I consider that I am obliged to raise the issue of public interest immunity with the Select Committee given that, in the ordinary course, it is both the duty of the Crown and of a court to prevent the production or use of a document when it would be injurious to the public interest to do so (*R v Fandakis* [2002] NSWCCA 5 at 39; *Sankey v Whitlam* (1978) 142 CLR 1 at 44).

In order to carry out my functions, and those of the NSW ICS, it is essential that I have access to confidential information from relevant stakeholders such as individuals as well as government and non-government entities. It is necessary that relevant stakeholders can trust that information provided to me on a confidential basis remains confidential. In fact, I provide them with this assurance prior to them providing me with relevant information. If confidential information were disclosed, it would reduce the extent to which stakeholders would provide information to me about, for example, the custodial centres.

The importance of receiving and protecting such confidential information is reinforced by the ICS Act. The ICS Act establishes a regime that restricts the disclosure of information obtained in connection with the administration or execution of that Act, and specific limitations as to the inclusion of sensitive information in any report to Parliament.

The ICS Act constrains me in a number of ways from disclosing certain information. In the paragraphs that follow, I outline those provisions relevant to the issue of confidentiality.

Section 25 of the ICS Act imposes a general prohibition on disclosing information and makes it an offence to do so except in limited circumstances:

25 Disclosure of information

A person must not disclose any information obtained in connection with the administration or execution of this Act (or any other Act conferring or imposing functions on the Inspector) unless that disclosure is made:

- (a) with the consent of the person from whom the information was obtained, or*
- (b) in connection with the administration or execution of this Act (or any such Act), or*
- (c) for the purposes of any legal proceedings arising out of this Act (or any such other Act) or of any report of any such proceedings, or*
- (d) in accordance with a requirement imposed under the Ombudsman Act 1974, or*
- (e) with other lawful excuse.*

Maximum penalty: 10 penalty units.

Section 14 of the ICS Act requires the NSW ICS to afford affected individuals and agencies an opportunity to respond to any express or implied criticism in my draft reports. The disclosure of draft reports, in whole or in part, would undermine this protection. I have arrangements with Corrective CSNSW, YJNSW and JHFMHN, the Ombudsman and ICAC to facilitate both the exchange, and the protection, of confidential information to allow us to perform our respective functions. Additionally, staff of the CSNSW, YJNSW and JHFMHN routinely participate in meetings and provide information to me and my Office during the course of inspections and liaison visits voluntarily but on the basis of confidentiality. Accordingly, it is not always necessary to exercise my powers of compulsion under the ICS Act.

In addition, there are specific provisions as to confidential information that apply when preparing and finalising a report to Parliament, which impose an obligation upon me to protect such sensitive information. Section 15 of the ICS Act (see below) prohibits the NSW ICS from disclosing information publicly through my reports to Parliament. Section 15 of the ICS Act also protects against the risk of



disclosure in the course of the NSW ICS discharging its functions of reporting to Parliament. Indeed, many of the "public interest considerations" in the inclusive list contained in section 15(3) overlap with the public interest immunity categories referred to above. Section 15 and the regime in the ICS Act more generally (namely, sections 14, 15, and 25) reinforce a number of the well accepted common law grounds of public interest immunity. For example, section 15 requires that I not disclose information in a report to Parliament if there is an overriding public interest against disclosure of that information. Section 15 of the ICS Act provides as follows:

15 Public interest considerations

- (1) *The Inspector must not disclose information in a report to Parliament if there is an overriding public interest against disclosure of the information.*
- (2) *There is an overriding public interest against disclosure of information for the purposes of this Act if (and only if) there are public interest considerations against disclosure and, on balance, those considerations outweigh the public interest considerations in favour of disclosure.*
- (3) *There are public interest considerations against disclosure of information for the purposes of this Act if disclosure of the information could reasonably be expected to have one or more of the following effects (whether in a particular case or generally):*
 - (a) *prejudice the supervision of, or facilitate the escape of, any person in lawful custody or detention,*
 - (b) *prejudice the security, discipline or good order of any custodial centre,*
 - (c) *prejudice national security (within the meaning of the National Security Information (Criminal and Civil Proceedings) Act 2004 of the Commonwealth),*
 - (d) *reveal or tend to reveal the identity of an informant or prejudice the future supply of information from an informant,*
 - (e) *identify or allow the identification of a person who is or was detained at a juvenile justice centre or in custody in a juvenile correctional centre,*
 - (f) *endanger, or prejudice any system or procedure for protecting, the life, health or safety of any person who is in custody, detained or residing at a custodial centre (including but not limited to systems or procedures to protect witnesses and other persons who may be separated from other persons at the centre for their safety),*
 - (g) *identify or allow the identification of a custodial centre staff member or endanger, or prejudice any system or procedure for protecting, the life, health or safety of such a staff member.*
- (4) *A determination as to whether there is an overriding public interest against disclosure of information is to be made in accordance with the following principles:*
 - (a) *the fact that disclosure of information might cause embarrassment to, or a loss of confidence in, the Government is irrelevant and must not be taken into account.*
 - (b) *The fact that disclosure of information might be misinterpreted or misunderstood by any person is irrelevant and must not be taken into account.*

Section 15 provides a range of information that must be protected under the ICS Act, including information that would allow the identification of a person who is, or was, detained at a custodial centre. It also includes information that could reveal the identity of custodial centre staff or prejudice any system for protecting their life, health or safety, or prejudice the security, discipline or good order of the custodial centre.

In the course of carrying out my functions and in preparing my final report, I must take great care so as not to inadvertently disclose the type of sensitive information identified in section 15. There is a significant degree of care required to ensure that such information is not disclosed and to ensure small, and otherwise innocuous pieces of information, are not released such that, when put together by motivated individuals, could disclose a complete statement of information that would otherwise be protected under section 15 of the ICS Act or other available mechanisms.

If information were to be inadvertently or otherwise disclosed, it would have a deleterious effect on the willingness of internal and external stakeholders to provide critical information to the inspection process. Without the free flow of information to the NSW ICS, my role as the Inspector - and that of the NSW ICS generally, would be prejudiced and its effectiveness severely hampered or compromised. Additionally, it would be inconsistent with the intentions of Parliament, as expressed in the regime within the ICS Act, for information of this kind to be publically disclosed.

Furthermore, the ICS Act sets out a framework for consultation with the Minister, and affected agencies and individuals prior to the provision of a report to Parliament. Accordingly, to the extent to which I have detailed my preliminary views on a matter, for example in a draft report, I consider that it would be inconsistent with the ICS Act (and principles of procedural fairness) for them to be publically disclosed. Moreover, a departure from the scheme of consultation established by the ICS Act may prejudice me in the carrying out of my functions, if it were to impact upon the willingness of individuals in the future to voluntarily cooperate with me and my Office and supply information. It could also prejudice the functions of other agencies such as CSNSW, YJNSW and other State and Commonwealth law enforcement bodies.

Although I have powers to compel the production of information, the majority of information gathered by the NSW ICS is done so on the basis of voluntary contributions from stakeholders. For completeness, the compulsory powers available to the Inspector are provided in section 7 of the ICS Act which provides as follows:

7 Powers of Inspector

The Inspector in the exercise of the Inspector's functions:

- (a) is entitled to full access to the records of any custodial centre (including health records) and may make copies of, or take extracts from, those records and may remove and retain those copies or extracts, and*
- (b) may visit and examine any custodial centre at any time the Inspector thinks fit, and*
- (c) may require custodial centre staff members to supply information or produce documents or other things relating to any matter, or any class or kind of matters, concerning a custodial centre's operations, and*
- (d) may refer matters relating to a custodial centre to other appropriate agencies for consideration or action, and*
- (e) is entitled to be given access to persons in custody, detained or residing at any custodial centre for the purpose of communicating with them.*

Section 8 of the ICS Act also confers incidental powers, namely, the "*Inspector has power to do all things necessary to be done or for or in connection with, or reasonably incidental to, the exercise of the Inspector's functions*".

In my view, the most effective and sustainable model of obtaining information for the purpose of the performance of my functions is through voluntary disclosures and I rely on my powers of compulsion as a last resort. This is why it is important that stakeholders who provide information to the NSW ICS in confidence can trust that this information will be treated with care and confidentiality.

Accordingly, it may be contrary to the public interest and inconsistent with the statutory regime created by the ICS Act for certain information gathered and held by the NSW ICS to be disclosed or published.



Therefore, for the reasons set out above, it is not possible to provide any detail in relation to the content of draft reports, including changes made to them, on the basis of an overriding public interest against their disclosure.⁵⁵

⁵⁵ *Inspector of Custodial Services Act 2012* (NSW), s 15(1).

Question 6 (see page 55 of the Transcript of Committee Hearing):

"Ms RAFTER: Before I finish could I table a diagram that shows the interaction about where we are. I thought it might assist the Committee.

The CHAIR: Yes, please do.

The Hon. PENNY SHARPE: That is good, I was asking for one of those. That is very helpful.

Ms RAFTER: It is a Venn diagram that shows where there are overlaps.

The Hon. TREVOR KHAN: We might be asking for a soft copy of that in due course.

The CHAIR: Actually, can you provide the secretariat with a soft copy - an emailed copy - because it may be useful.

Ms RAFTER: Of course."

Response:

A soft copy of the diagram is **Attachment 3** to this letter.

Clarifications to the Transcript of the Inquiry Hearing on 8 December 2020

I provide the following clarification of a answers that I provided that appear on pages 46 and 55 of the Transcript to assist the Select Committee and ensure that they have the benefit of a fulsome response to the questions posed by the Hon. Penny Sharpe and the Chair, the Hon. Adam Searle, respectively.

Transcript, page 46:

"The Hon. PENNY SHARPE: How many staff do you have?"

Ms RAFTER: I have 14.2 at the moment."

Clarification:

The Transcript suggests that I have a total of 14.2 staff. However, it is more fulsome to say that I have 14.2 Full Time Equivalent (FTE) positions.

Accordingly, I propose that page 46 of the Transcript be amended to read as follows:

"The Hon. PENNY SHARPE: How many staff do you have?"

Ms RAFTER: I have 14.2 FTE positions at the moment."

Transcript, page 55:

"The CHAIR: In 2018 there was a bit of controversy in the media about you amending one of your reports in light of feedback from the Minister, but you were not forthcoming as to what those changes were. Are you able to tell us or provide us on notice some insight into what those changes were in relation to that report?"

Ms RAFTER: Yes, I am more than happy to take it on notice. At that point of the process I am usually still doing some editorial. I am working on one at the moment that is due to be tabled very soon.

The CHAIR: I guess the question is whether they were simply grammatical, editorial changes or whether they were substantial -

Ms RAFTER: Updating data - I know I went into one. I have had the Minister's feedback but it was not anything raised by the Minister. I realised that the Bureau of Crime Statistics and Research report had probably just been updated so I just wanted to make sure what I had in there was the most accurate and up to date; it was not changing anything in particular.

The CHAIR: You did not change any of the recommendations?"

Ms RAFTER: Any substantive.

The CHAIR: You did not change any recommendations?"

Ms RAFTER: No.

Mr DAVID SHOEBRIDGE: Just to close the loop on this, each of your reports have gone through that process with the Minister, is that right?

Ms RAFTER: That is right.

Mr DAVID SHOEBRIDGE: Have you changed your recommendations at any point following a response from the Minister?

Ms RAFTER: I will take that on notice in case I have changed a word - but not necessarily because of what is in the Minister's submission.

Mr DAVID SHOEBRIDGE: There have been a bunch of reports so I am more than happy for you to take that question on notice and I think it is only right that you do.

Ms RAFTER: Yes, there have been a lot.

The CHAIR: It is not a "gotcha" moment; we just want to know the answer.

Ms RAFTER: Yes, I appreciate that. To make sure it is complete accurate I will take it on notice."

Clarification:

In my response I was referring to the *Inspection of Six Youth Justice Centres in NSW (2020 Report)* (which I was in the process of finalising at the time of hearing). My reference to "updating data" was in relation to the 2020 Report and not the 2018 Report.

Accordingly, I propose that page 55 of the Transcript be amended to read as follows:

The CHAIR: In 2018 there was a bit of controversy in the media about you amending one of your reports in light of feedback from the Minister, but you were not forthcoming as to what those changes were. Are you able to tell us or provide us on notice some insight into what those changes were in relation to that report?

Ms RAFTER: Yes, I am more than happy to take it on notice. At that point of the process I am usually still doing some editorial work. I am working on one at the moment that is due to be tabled very soon.

The CHAIR: I guess the question is whether they were simply grammatical editorial changes or whether they were substantial -

.....

Ms RAFTER: I know I went into one. In relation to the 2020 Report, the changes involve updating data. I have had the Minister's feedback but it was not anything raised by the Minister. I realised that the Bureau of Crime Statistics and Research report had probably just been updated so I just wanted to make sure what I had in there was the most accurate and up to date; it was not changing anything in particular.

The CHAIR: You did not change any of the recommendations?

Ms RAFTER: Any substantive.

The CHAIR: You did not change any recommendations?

Ms RAFTER: No.

Mr DAVID SHOEBRIDGE: Just to close the loop on this, each of your reports have gone through that process with the Minister, is that right?

Ms RAFTER: That is right.

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Ms RAFTER: Yes, there have been a lot.

The CHAIR: It is not a "gotcha" moment; we just want to know the answer.

Ms RAFTER: Yes, I appreciate that. To make sure it is completely accurate I will take it on notice."

NSW Oversight Bodies - as at 8 December 2020

